No. 03-20-00497-CV

IN THE COURT OF APPEALS
FOR THE THIRD DISTRICT OF TEXAS
AUSTIN TEXAS

Ruth Hughs, in her official capacity as Texas Secretary of State,
Appellant

v.

MOVE Texas Action Fund,
Appellee

MOVE TEXAS ACTION FUND'S REPLY REGARDING ITS EMERGENCY MOTION TO REINSTATE TEMPORARY INJUNCTION

MOVE Texas Action Fund ("MOVE") filed an emergency motion for a temporary order to reinstate, pending this appeal, a temporary injunction against Ruth Hughs, in her official capacity as Texas Secretary of State ("SOS"), and Dana DeBeauvoir, in her official capacity as Travis County Clerk ("Clerk"). In response, the SOS argues that this Court simply has no authority to grant such temporary relief. But that is wrong. While the State's ability to supersede a judgment is automatic, it is not absolute. This Court has previously recognized that the appellate courts have authority to grant temporary relief and reinstate trial court injunctions. Because of the balance of the equities, and with deference to the trial court's fact findings, this Court should exercise that authority here.

REPLY TO SOS RESPONSE

A. This Court has previously acknowledged its authority to grant the exact relief MOVE seeks, and it should grant that relief here.

The SOS argues that this Court cannot grant temporary relief to reinstate the Injunction against the SOS, and even if it did, the Supreme Court of Texas would stay this Court's order on mandamus. That contention disregards this Court's inherent authority pursuant to Rule 29 and the Texas Constitution, and it makes assumptions about the Supreme Court that are not supported by its prior decisions or its explicitly stated concerns regarding the separation of powers and the executive branch's ability to immunize itself completely from any temporary injunctive orders.

First, this Court has previously granted temporary relief under exactly these circumstances. *See Tex. Educ. Agency v. Houston Indep. Sch. Dist*., No. 03-20-00025-CV, 2020 WL 1966314, at *6 (Tex. App.—Austin Apr. 24, 2020, no pet.) ("[W]e grant the District's motion for temporary orders under Rule 29.3. We order that the trial court's temporary injunction remains in effect to preserve the parties' rights until the disposition of this appeal."). In arguing that this Court lacks the power to enter to reinstate the Injunction pending appeal, the SOS asks the Court to ignore its recent decision in that case. Resp. at 11 ("*TEA* should [not] be applied…."). The SOS contends that the Court should disregard the exhaustive, careful, and ultimately correct analysis in *TEA* merely because the SOS predicts that the Supreme Court will reverse that decision after oral argument next week. Of course, this Court is not

free to jettison its own precedent based on the self-serving prediction of a litigant. *Lawson v. Keene*, 03-13-00498-CV, 2016 WL 767772, at *4 (Tex. App.—Austin Feb. 23, 2016, pet. denied) ("We may not overrule a prior panel opinion of this court absent an intervening change in the law by the Legislature or a higher court or by decision of this court sitting en banc." (quoting *Ayeni v. State*, 440 S.W.3d 707, 717 (Tex. App.—Austin 2013, no pet.) (Pemberton, J., concurring))).

Second, the SOS's prediction regarding what will happen next does not hold water. The SOS contends that this Court should abstain from reinstating the Injunction because the Supreme Court is considering the scope of the State's right to supersede an injunction in an unrelated matter without the same time sensitivities. The SOS's contention ignores the differences between the matters and the Supreme Court's explicit recognition that the "[g]overnment's right to supersede a judgment may be automatic, but it is not absolute." *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 803 (Tex. 2014). This principle is not changed by the Legislature's later amendment to Rule 24 requiring that a *district court* cannot prevent the government from superseding a judgment; when the requested relief is made at a court of appeals pursuant to Rule 29, that amendment is inapplicable.

Contrary to the SOS's assumptions, the Supreme Court could (and should) affirm this Court's prior holdings to that effect, in line with its previous analysis that allowing the State to engage in any illegal activity throughout the merits of a case

and appeal without recourse through the courts or otherwise, divests the courts of their inherent right to preserve the rights of the parties and issue temporary orders as justice requires. The Supreme Court has noted that such deprivation likely oversteps the separation of powers inherent in the Texas Constitution:

> The State's position—boundless entitlement to supersede adverse non-money judgments—would vest unchecked power in the executive branch, at considerable expense to the judicial branch, not to mention the wider public we both serve. The Texas Constitution divides governing power among three branches, and power seized by one branch necessarily means power ceded by another. Our State Constitution, like Madison's Federal handiwork, is infused with Newtonian genius: three rival branches locked in synchronous orbit by competing interests—ambition checking ambition. These are abstract principles, but they have real-world ripple effects on the lives of everyday Texans.

In re State Bd. for Educator Certification, 452 S.W.3d 802, 808 (Tex. 2014); *see also id.* at 808 n.39 (citing TEX. CONST. art. 2, § 1) ("[T]he Texas Constitution takes Madison a step further by including, unlike the Federal Constitution, an explicit Separation of Powers provision to curb overreaching and to spur rival branches to guard their prerogatives.").

Ultimately, the Supreme Court may stay a temporary order if this Court grants one, but that is not a reason to duck the decision. If the SOS is wrong about the absolute inviolability of its stay right, and the Supreme Court determines in reviewing the *TEA* temporary order on mandamus that this Court has authority to reinstate a temporary injunction through temporary orders, then a temporary order

in this case would take effect. MOVE urges the Court to grant a temporary order and let the chips fall where they may regarding what the Supreme Court may do with it.

B. On the merits, reinstating the Injunction is necessary and appropriate.

The SOS argues that this Court should decline to grant temporary relief, even if it has authority to grant such relief, because MOVE is unlikely to prevail on the merits of this appeal. SOS Resp. pp.13-17. Though the merits are not strictly before this Court on temporary relief, the SOS is wrong on both the facts and the law regarding the likelihood of MOVE's success on the merits.

As a fundamental matter, the SOS mischaracterizes MOVE's Equal Protection claim when it states: "MOVE cites no authority for the proposition that voters who fail to apply for a mail-in ballot by Texas's reasonable deadline are entitled to nevertheless vote by mail." SOS Resp. p.16. The issue is not that voting by mail could be more convenient, or that there are other ways a voter could cast a ballot. The issue is unequal treatment in how the absentee voting process operates. A voter who is diagnosed with COVID-19 on October 21 can self-certify as having a qualifying disability and receive an absentee ballot; a voter who receives the same diagnosis on October 24 cannot. The late-diagnosed voter must secure a doctor's certification—with all of the logistical and economic cost that entails, if the voter can get one at all—and that is a significantly greater burden. Moreover, the existence of the disability—a diagnosis of COVID-19—is outside the control of the voter. Yet

similarly-situated voters are treated unequally under the late ballot procedure, and the Equal Protection guarantee prohibits such treatment.

MOVE's trial brief is attached as App.4 to its motion for temporary relief. The trial brief addresses the various merits arguments that the SOS raises in its response here, all of which were rejected by the trial court after considering the evidence and argument at the temporary injunction hearing.[1] MOVE's organizational standing to bring its claims is addressed at pages 10-11 and 14-16 of the trial brief. The merits of its Equal Protection claim are addressed at pages 17-24 of the brief, including discussion of the Fifth Circuit's very recent opinion rejecting the rational basis test that the SOS advances to this Court. *See Tex. Democratic Party v. Abbott*, No. 20-50407, slip op. at 12-13 (5th Cir. Oct. 14, 2020).[2] The doctor's certification requirement fails the applicable *Anderson-Burdick* balancing test:

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[1] In considering any likelihood of success on the merits, the Supreme Court has explained that the court of appeals should defer to factual determinations made by the trial court that heard evidence on the facts involved, and should not substitute its judgment for that of the trial court, even if it would have reached a contrary conclusion. *See Butnaru v. Ford Motor Co*., 84 S.W.3d 198, 211 (Tex. 2002). Further, in evaluating the evidence to review a likelihood of success on the merits, irreparable injury, and the equities involved, the appellate court must draw all legitimate inferences from the evidence in the light most favorable to the trial court's order. *State v. Ruiz Wholesale Co*., 901 S.W.2d 772, 777 (Tex. App.—Austin 1995, no writ).

[2] This opinion is the merits panel decision on a constitutional challenge to the absentee qualification. The earlier motions panel opinion in the same case is *Tex. Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020). The new merits panel opinion expressly rejected the prior motions panel's determination that a rational basis inquiry applies to Equal Protection challenges to the Texas absentee ballot requirements. No. 20-50407 at slip op. at 36-37. The opinion also rejected the prior motions panel's reliance on *McDonald* for the applicable standard. *Id*. (citing *McDonald v. Bd. of Election Comm'rs of Chi*., 394 U.S. 802, 807–08 (1969)). The opinion is clear in its criticism of the panel opinion: "We therefore use our authority as the panel resolving the

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

The Clerk testified through a declaration that enjoining the doctor's certification would not cause any additional administrative effort in overseeing the election. Her procedures for handling absentee ballots would not have to change; she would simply have to verify only the self-certification portion of any late application and not check for a completed doctor's certification. The balance of equities thus weighs in favor of the Injunction, as the trial court found as a factual matter.

C. From a timing standpoint, it is not too late to decide this issue, and indeed the imminence of the election demonstrates the urgency of the relief requested.

The SOS urges the Court to deny temporary relief because we are on the eve of the election and early voting is underway. SOS Resp. pp.12-13. But the doctor's certification requirement applies only for disabilities that originate *on or after* the regular vote-by-mail application deadline, which is October 23. Only if a voter receives a COVID-19 diagnosis *on or after* that date would the Injunction allow her

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merits to declare that the holdings in the motions panel opinion as to *McDonald* are not precedent." *Id*. at 37. The SOS's arguments regarding Equal Protection and application of rational basis scrutiny rely heavily on the discredited panel opinion and *McDonald*. *See* SOS Resp. pp. 14-15.

to self-certify and forego the doctor's certification. Indeed, a late application cannot even be submitted to the local election officer until after early voting ends on October 30. Tex. Elec. Code § 102.003(b) ("An application may be submitted after the last day of the period for early voting by personal appearance and before 5 p.m. on election day."). It is not too late for meaningful relief, nor would a temporary order change the rules for any voting that is actually underway.

The SOS's reliance on the federal courts' *Purcell* doctrine is misplaced. That line of cases starting with *Purcell v. Gonzalez*, 549 U.S. 1 (2006), however, applies in *federal* courts and is specifically premised on concepts of federalism that are not applicable in the state courts. Most important, *Purcell* applies only where the challenged injunctive relief could "result in voter confusion and consequent incentive to remain away from the polls." *Id*. at 4–5. The Fifth Circuit has explained this further, noting that the doctrine applies if the injunction would "substantially disturb the election process," as measured by: "the potential for voter confusion" and "interference with [the State's] ongoing election preparation." *Thomas v. Bryant*, 919 F.3d 298, 315 (5th Cir. 2019). None of these concerns is present in this matter, as the Injunction will actually reduce voter confusion and the burden on local election officials. The Supreme Court's recent citation to *Purcell*, in distinct circumstances with far reaching consequences to voters during an ongoing election, does not disturb this analysis. *In re Hotze*, No. 20-0739, 2020 WL 5919726 n.18

(Tex. Oct. 7, 2020). Finally, because of the constitutional violations alleged here—which, by statute, can never arise until 11 days prior to an election—the argument that *Purcell* prevents judicial consideration of the issue would effectively make the statute immune to any challenge whatsoever because the injury it causes will always occur only "close to an election."

CONCLUSION AND PRAYER

Ultimately, the SOS's response regarding temporary relief is that this Court is powerless to grant the temporary relief. But that is wrong. This Court has granted temporary relief under similar circumstances in the past, and the scope of its authority to do so will be finally resolved one way or the other in the near future.

For the foregoing reasons, MOVE respectfully prays that this Court grant it temporary relief under Rule 29.3 reinstating the Injunction pending appeal.

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